DOCKET FILE COPY ORIGINAL

ORIGINAL

00-125

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)
	)
Biennial Regulatory Review 2000	)

BIENNIAL REVIEW 2000 COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON BARKER KNAUER, LLP
2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037-1128
(202) 783-4141

Its Attorneys

October 10, 2000

TABLE OF CONTENTS

EXECUTIVE SUMMARY

As the trade association of the fixed wireless communications industry, the Wireless Communications Association International, Inc. ("WCA") applauds the efforts of the Commission and its staff to identify and eliminate the current hodgepodge of inconsistent and/or obsolete regulatory requirements that are delaying widespread deployment of broadband services over high-bandwidth, fixed wireless systems. The regulatory regimes created for fixed wireless services of relatively recent vintage (*e.g.*, Wireless Communications Service, Local Multipoint Distribution Service, 24 GHz and 38 GHz) generally reflect the Commission's current policy of promoting flexible use of spectrum with a minimum level of regulatory oversight. By contrast, service providers using the Multipoint Distribution Service ("MDS") and Instructional Fixed Television Service ("ITFS"), which have their origins in Commission decisions dating back to the 1960s and 1970s, continue to be burdened with the excessive regulation of that era. Given the Commission's recognition of the enormous potential MDS/ITFS service holds for introducing competitive broadband service to underserved markets, the time has come for the Commission to extend the same deregulatory policies to MDS/ITFS and all other fixed wireless services wherever possible, regardless of the frequencies they use.

Consistent with the broader objective of the Commission's biennial review process - - "to reduce applicant and licensee burdens" and "reduce filing burdens and increase the efficiency of application processing" -- WCA herein makes fourteen separate recommendations for elimination or substantial modification of Commission rules and other requirements that impose outdated regulatory obligations on MDS and ITFS licensees. By and large, WCA's proposals are directed at Commission rules and requirements that either (1) require redundant filings of periodic reports; (2) mandate submission of superfluous application information or impose other administrative impediments to rapid construction of MDS/ITFS; or (3) have been rendered obsolete or impractical in the wake of the Commission's adoption of rules permitting the permanent licensing of MDS/ITFS facilities for two-way services. If adopted, WCA's proposals will pave the way for more expeditious introduction of MDS/ITFS-based broadband service to the public, without undermining the Commission's overriding mandate to regulate in the public interest. Equally important, adoption of WCA's proposal would represent a significant step towards the achievement of true regulatory parity between all fixed wireless services, which again will facilitate expedited deployment of MDS/ITFS-based broadband service with no corresponding harm to the public.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)
	)
Biennial Regulatory Review 2000	)
	)

BIENNIAL REVIEW 2000 COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.430 of the Commission's Rules and the Commission's September 19, 2000 *Public Notice*, hereby submits its initial comments in response to the report of the Commission's staff on its review of the Commission's Rules to identify those that can be eliminated or modified (the "Staff Report") to ensure that they are "up-to-date."[1]

I. INTRODUCTION

As the trade association of the fixed wireless communications industry, WCA has a vital interest in this proceeding. The Commission has recently observed that "fixed wireless services have the potential to create facilities-based competition in numerous industries beyond the traditional mobile markets," and that "[o]ne of the great advantages of fixed wireless is its ability to provide broadband services relatively cheaply and quickly in comparison with wireline technologies."[2] However, the fixed wireless industry's ability to realize its potential is being hampered by unnecessary regulatory impediments. Indeed, it is a matter of record that there remain a variety of regulatory barriers which are delaying widespread deployment of high-

---

[1] "Biennial Review 2000 Staff Report Released," *Public Notice*, FCC 00-346 (rel. Sept. 19, 2000) [hereinafter "*Public Notice*"].

[2] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services (Fifth Report)*, 15 FCC Rcd 17660, Appendix E at 1, 8 (2000) [hereinafter "*CMRS Fifth Report*"].

bandwidth, fixed wireless systems.[3] Although this proceeding is not the appropriate vehicle for addressing all of those impediments, WCA is pleased that the Commission has chosen to review all of its rules in this proceeding, not just those implicated by Section 11 of the Communications Act of 1934, as amended, and Section 202(h) of the Telecommunications Act of 1996.[4]

Because services such as the Wireless Communications Service ("WCS"), the Local Multipoint Distribution Service ("LMDS") and the fixed wireless services in the 24 GHz and 39 GHz bands are of relatively recent vintage, the regulatory regimes crafted by the Commission for those services generally reflect the Commission's current policy of promoting flexible use of spectrum with a minimum level of regulatory oversight.[5] By contrast, service providers using the Multipoint Distribution Service ("MDS") and the Instructional Television Fixed Service ("ITFS"), which have their origins in Commission decisions dating back to the 1960s and 1970s, continue to be burdened with the excessive regulation of that era. Due to the favorable propagation characteristics of the 2 GHz band, service providers using MDS and ITFS are likely to be the only source of wireless broadband competition in the residential marketplace. Moreover, the Commission has recognized that MDS/ITFS in particular is "well-suited for not only residential customers, but customers in rural, underserved, and unserved areas as well."[6]

---

[3] *See, e.g., Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, (Fourth Report)*, 14 FCC Rcd 10145, 10268-70 (1999).

[4] *See Public Notice*, at 1.

[5] *See, e.g., Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands: Implementation of Section 309(j) of the Communications Act - - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, 12 FCC Rcd 18600, 18615-16 (1997) (adopting flexible use rules for 39 GHz service); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, 10798 (1997) ("We believe that in this instance a flexible use allocation serves the public interest. Permitting a broad range of services to be provided on this spectrum will permit the development and deployment of new telecommunications services and products to consumers.").

[6] *CMRS Fifth Report*, Appendix E at 8.

Clearly, given Congress's desire to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,"[7] there is no sensible public policy justification for the Commission to retain MDS and ITFS rules that unnecessarily restrict or delay the deployment of MDS/ITFS-based broadband services.

Without doubt, the greatest impediments to rapid deployment of MDS/ITFS-based fixed wireless broadband technologies, particularly into the residential and underserved marketplaces, are the unintended consequences of the Commission's overly-complex and overly-conservative MDS/ITFS interference protection rules. In an environment where service providers using WCS, LMDS, 24 GHz and 38 GHz spectrum can deploy facilities within their service areas at will (subject to enforcement action where interference occurs), the MDS/ITFS interference protection scheme only serves to delay, and in some cases prevent, new services in the areas where broadband deployment is needed the most. Nonetheless, WCA recognizes that this is not the proper time or place to revisit the Commission's interference protection rules for MDS/ITFS, and thus WCA will leave its concerns for another day.

However, a variety of other regulatory barriers are delaying widespread deployment of MDS/ITFS broadband systems, and they can be addressed here. To a large extent, these barriers exist because the Commission's regulatory framework for MDS and ITFS was first established long ago, and did not account for the possibility that the spectrum would be used for digital, two-way broadband services. As a result, fixed wireless providers using MDS/ITFS continue to be burdened by a hodgepodge of inconsistent, obsolete regulatory requirements that are not imposed on their competitors. WCA applauds the effort of the Commission and its staff to identify and eliminate those rules. Because both MDS and ITFS are regulated by the Mass Media Bureau,

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56 (1996).

WCA will restrict its comments below to the portion of the Staff Report captioned "Summary of Review by Mass Media Bureau."

II. DISCUSSION OF REVIEW BY MASS MEDIA BUREAU

The Commission's objectives for this proceeding were well-stated when the Commission commenced its first biennial review of the Mass Media Bureau's rules – "to reduce applicant and licensee burdens" and to "reduce filing burdens and increase the efficiency of application processing."[8] In addition, because Parts 21 and 74 of the Commission's Rules have undergone significant revisions over the past decade, this biennial review affords the Commission an opportunity to eliminate rules that have been rendered obsolete but have inadvertently remained in effect. And, as the Commission's regulatory philosophy has evolved in rulemakings not directly involving MDS and ITFS, it is now impossible to square certain portions of the MDS/ITFS regulatory scheme with the treatment of similar services. The Staff Report correctly recognizes that "Part 21 contains language and requirements that have been superseded by recent Commission rulemakings."[9] Therefore, WCA commends the staff for recommending that "Part 21 be reviewed to ensure consistency with recent Commission rulemakings"[10] and recommends that certain portions of Part 74 are equally due for review.

Set forth below are WCA's suggested revisions to specific provisions that have been rendered obsolete by Commission rulemakings that either directly implicate MDS/ITFS or that evidence a more flexible regulatory approach that should be incorporated into MDS/ITFS in order to provide a measure of regulatory parity. Specifically, WCA recommends the following rule changes:

---

[8] *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998) [hereinafter "*1998 Mass Media Bureau Biennial NPRM*"].

[9] Staff Report, Appendix IV at 36.

1. Eliminate the Section 21.911 annual report. Since the days when MDS licensees were required to provide service pursuant to tariff as common carriers, Section 21.911 and a predecessor rule have required licensees to annually report to the Commission such information as the total hours of transmission service devoted to each of entertainment, education and training, public service, data transmissions and other services.[11] While it was not unduly difficult to comply with this requirement when MDS stations were used for the downstream transmission of cable-like video programming on a twenty-four hour a day, seven day a week basis, it has become virtually impossible for licensees to provide the required data now that MDS facilities are being used for two-way, digital wireless broadband services. An MDS licensee offering such service is transmitting digital bits, and whether those bits are being used to provide entertainment, education, data, or one of the other categories is unknown and, as a practical matter, unknowable, to the licensee.[12] Particularly since the Commission has never articulated any purpose for collecting this categorized usage data, and to the best of WCA's knowledge has

---

[10] *Id.*

[11] The requirements set forth in Section 21.911 were initially set forth in Section 43.72 of the Commission's Rules. *See Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616 (1973); *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service and Cable Television Relay Service*, 5 FCC Rcd 6410, 6431-32 (1990).

[12] Indeed, the Section 21.911 reporting categories raise questions of an almost metaphysical nature that the Commission would have to address in order to properly guide licensees in the filing of reports where they provide digital broadband services. For example, even if a licensee could know that a student was viewing the Discovery Channel delivered over MDS by streaming video to his or her home computer, how would it know whether to categorize those transmissions as education, entertainment, or data? And, since sectorization will allow multiple digital bits to be transmitted by a given station on a given channel at any given moment in time, the fundamental concept behind the Section 21.911 reporting structure – that the station is only used for one category at a time – is flawed. Thus, the Commission will have to provide licensees with greater guidance as to the Section 21.911 reporting requirements if it chooses to retain the rule.

never made any use of this data, there is no reason to burden MDS licensees with the obligation to provide it. Moreover, it should be noted that, like other broadband service providers, those using MDS/ITFS to provide broadband services must submit on a semi-annual basis an FCC Form 477 to provide basic information about deployment of broadband service.[13] This new requirement further obviates the need for imposing a separate Section 21.911 reporting requirement on MDS licensees (and MDS licensees alone among all broadband service providers).

In addition to categorized usage data, Section 21.911 requires each licensee to report any period during which an MDS station was not operational or provided no service. That information has been used on occasion to monitor compliance with Section 21.303 of the Rules, which requires an MDS licensee to notify the Commission and/or return its license to the Commission for cancellation if a station is involuntarily rendered non-operational for more than 48 hours, a licensee voluntarily discontinues service, or a channel is not used to render service for a year. Section 21.303, however, already imposes an absolute obligation on each MDS licensee to take the appropriate action when a station is rendered non-operational or does not provide service for an extended period of time. As a result, Section 21.911 is largely duplicative in that, to the extent it calls for meaningful reporting, it requires a licensee to report what the licensee should have already reported pursuant to Section 21.303. WCA, therefore, urges the Commission to eliminate Section 21.911 altogether.

2. Modify Section 21.11(a) to eliminate unnecessary annual filings. FCC Form 430, the Licensee Qualification Report, is required of all new applicants for MDS facilities. Section 21.11(a) mandates that no later than March 31st of any given year, each filer of an FCC Form

[13] *See Local Competition and Broadband Reporting*, 15 FCC Rcd 7717 (2000).

430 must submit a revised FCC Form 430 if any changes in the reported information occurred during the prior year. WCA has no objection to these requirements. However, WCA believes that the Commission should eliminate the provision of Section 21.11 of the Rules that requires the submission by March 31st of any given year of a letter advising the Commission that no change to the FCC Form 430 information on file occurred during the prior year. Since Section 21.11(a) requires the submission of a revised form when changes have occurred, the Commission can and should assume that the failure to file such a report on FCC Form 430 by March 31st is a representation by the entity that no changes occurred during the preceding year.

3. Revise the rules relating to transfers of control and assignments. WCA submits that the Commission's goal of reducing filing burdens and increasing the efficiency of the application process can be advanced through two changes in the Commission's rules and policies relating to transfers of control and assignments of licenses.

First, the Commission should revise the requirements set forth in Sections 21.11(d) and (e) of the Rules that assignments of licensees and transfers of control of licensees be consummated within 45 days of the grant of the application for Commission consent to the transaction. It is frequently the case that the parties to such a transaction prefer to delay consummation until after the Commission consent becomes "final" – no longer subject to reconsideration or review. Because a petition for reconsideration can be filed 30 days after the Commission gives public notice of the grant (which notice can occur somewhat after the grant itself),[14] and the Commission itself has 40 days in which to review the grant,[15] consent does not become "final" until just before (and in some cases, after) the 45 day period to consummate has run. Therefore, it is quite often the case that the parties to a transfer of control or assignment

[14] *See* 47 C.F.R. § 1.104(b).

must seek additional time beyond the 45 day period to consummate the transaction, and the Commission must act on that request. Since such requests are routinely granted (WCA is unaware of any instance in which the staff has rejected a request for additional time to consummate a transaction), the Commission can eliminate this burden on applicants and the staff by amending Sections 21.11(d) and (e) to routinely afford parties 75 days in which to consummate transfers of control and assignments.

Second, WCA urges the Commission also to eliminate the requirement that prior approval be obtained for *pro forma* assignments of Part 21 licenses and transfers of control of Part 21 licensees authorized to offer telecommunications services. In its 1998 *Memorandum Opinion and Order* granting the Federal Communications Bar Association's Petition for Forbearance (the "FCBA Petition") regarding non-substantial assignments and transfers of wireless licenses, the Commission permitted *pro forma* transfers and assignments without prior consent (subject to after-the-fact notice to the Commission) and declared that "[w]e will apply forbearance from section 310(d) requirements for pro forma applications *uniformly* to telecommunications carriers licensed under Part 21 (domestic public fixed radio services), Part 22 (public mobile radio services), Part 24 (personal communications services), Part 27 (wireless communications services), Part 90 (private land mobile radio services), and Part 101 (fixed microwave services) of our rules."[16] However, the Commission only amended the relevant Part

---

[15] *See* 47 C.F.R. § 1.102(a)(2).

[16] *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licensees and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 6293, 6306-7 (1998) (emphasis added).

22, Part 24, Part 27, Part 90 and Part 101 Rules, but not Section 21.38.[17] Accordingly, WCA is merely asking that Section 21.38 be amended here to give full effect to the Commission's ruling on the FCBA Petition.

4. Revise Section 21.13(f) to eliminate obsolete provisions relating to licensees that lease spectrum. The Commission should substantially modify, if not eliminate, the provisions of Section 21.13(f) relating to situations in which the licensee will not actively participate in the day-to-day management or operation of an MDS station. WCA appreciates that the Commission must assure that a licensee retains the requisite control over its station. However, as the Commission recognized in the *Report and Order* in MM Docket No. 97-217, the increasing cellularization and sectorization of MDS/ITFS systems utilizing spectrum licensed to multiple licensees makes it increasingly likely that no licensee (other than the system operator) will have any day-to-day involvement in the operation and maintenance of the station.[18] To minimize filing burdens on licensees and the Commission's staff, WCA suggests that the Commission merely require applicants to certify that they will maintain the requisite control, rather than requiring the submission of demonstrative statements and copies of management contracts as is currently mandated by Section 21.13(f). The Mass Media Bureau's biennial streamlining efforts have been marked by "increase[d] reliance on applicant certifications rather than more detailed applicant informational disclosures."[19] Replacing the Section 21.13(f) filing requirement with a certification requirement will be fully consistent with that effort.

---

[17] *See id.* at 6314-18.

[18] *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19176 (1998) [hereinafter "*MDS/ITFS Two-Way Order*"].

[19] *Mass Media Bureau 1998 Biennial NPRM,* at 23056.

5. Eliminate requirements for filing and maintaining accurate copies of articles of incorporation, partnership agreements, etc. Although not required by any specific rule, up until recently many of the application forms filed by MDS applicants required them to have on file with the Commission copies of their articles of incorporation, partnership agreements or other underlying organizational documents. With the release over the past several years of new MDS application forms (specifically, FCC Forms 304, 305, 306, 331 and 430), those requirements have been eliminated. However, Section 21.305 of the Rules still requires that amendments to these sorts of organizational documents be filed with, strangely enough, the Chief, Common Carrier Bureau. Given that the Commission no longer requires the filing of organizational documents, it should eliminate the requirement of Section 21.305 that amendments be filed.

6. Eliminate the Section 21.43 restriction on pre-grant construction. The Commission should eliminate the provisions of Section 21.43 of the Commission's Rules barring an MDS licensee from commencing construction of facilities until the application therefor has been granted. Under Section 319(d) of the Communications Act of 1934, as amended, the Commission has authority to eliminate this requirement.[20] In a variety of other services, the Commission has exercised its authority under Section 319(d) and permits applicants to commence construction of proposed facilities at their own risk.[21] There is no sound policy

---

[20] 47 U.S.C. § 319(d) (2000), *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(m), 110 Stat. 56 (1996).

[21] *See Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, 16179-80 (2000); *Amendment of Part 5 of the Commission's Rules to Revise the Experimental Radio Service Regulations*, 13 FCC Rcd 21391, 21401 (1998); *MCI Telecommunications Corporation Request for Section 319(d) Waiver in the Direct Broadcast Satellite Service*, 12 FCC Rcd 9875, 9876 (1997); *Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite in the Domestic and International Fixed Satellite Service*, 12 FCC Rcd 3154, 3163 (1997); *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 FCC Rcd 5936, 5998 (1994).

reason not to do so here. Indeed, the public will be well-served by such a change, since permitting pre-grant construction will expedite the inauguration of new broadband wireless services to the public. Since most of the services against which MDS/ITFS will compete are subject to geographic licensing and do not even need Commission authorization to add or modify facilities, elimination of the ban on pre-grant construction will help put competing service providers on a more equal footing in quickly meeting demands for new services.

7. Eliminate the vertical profile sketch requirement of Section 21.15(c). Section 21.15(c) of the Commission's Rules generally requires applications submitted under Part 21 to include vertical profile sketches and to include on that sketch certain information regarding the antenna supporting structure and the proposed antenna. In 1995, the Commission recognized that this information could as readily be included in the application form, revised the MDS long-form application accordingly, and amended Section 21.15(c) to permit MDS applicants to forego the submission of a vertical profile sketch when submitting a long-form application.[22] Because the data requirements formerly imposed by Section 21.15(c) have now been fully incorporated into the two MDS long-forms (FCC Form 304 for new main stations and FCC Form 331 for modified main stations and new or modified response station hubs and boosters), and because Part 21 now only applies to the MDS, there no longer exists any reason to maintain the vertical profile sketch requirement of Section 21.15(c).

8. Eliminate the requirement that an applicant for a booster station demonstrate that the station can be served without receiving interference. Sections 21.913(b)(6) and 74.985(b)(3) of the Commission's Rules require that an applicant for a new booster station hub demonstrate

---

[22] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd 9589, 9681 (1995).

that the proposed facility can be served without receiving interference. Those rule requirements were waived during the initial MDS/ITFS filing window.[23] Because compliance with these rules in the future could prove unduly burdensome, the Commission should take this opportunity to eliminate them.

The language in issue was initially proposed in the petition for rulemaking that commenced MM Docket No. 97-217.[24] The concern leading to the proposal was that applicants could propose facilities that would be unusable due to interference from existing stations, but would have the strategic effect of preventing neighbors from subsequently modifying their own facilities because the neighbor's modified facilities would still cause some interference. At the time, the Commission had not yet clarified the interference obligations that would be imposed on the neighbor in such a case when that neighbor sought to modify its facility, so the concern was a very real one. However, in its 1999 *Report and Order on Reconsideration* in MM Docket No. 97-217, the Commission made clear that an applicant who proposes a facility that suffers interference cannot thereafter preclude the interfering station from making modifications that failed to eliminate that interference.[25] In light of that recent clarification, Sections 21.913(b)(6) and 74.985(b)(3) no longer serve a role, since the incentive for the filing of preclusive booster applications has been largely eliminated.

---

[23] *See* Mass Media Bureau Provides Further Information on Application Filing Procedures for Two-Way Multipoint Distribution Service and Instructional Television Fixed Service <http://haifoss.fcc.gov/prod/mmb/forms/faq.htm>.

[24] *See* Petition for Rulemaking of Petitioners, RM-9060, Appendix B at 18 (MDS response hubs), 28 (MDS boosters), 49 (ITFS response hubs) and 58 (ITFS boosters) (filed March 14, 1997).

[25] *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions and Request For Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 14 FCC Rcd 12764, 12795-98 (1999) [hereinafter "*MDS/ITFS Two-Way Reconsideration Order*"].

While the rules are obsolete, they are hardly benign. The problem any booster applicant faces is that the rule is unclear, and in any event is difficult to comply with. Most importantly, the Commission has not specified whether interference to the booster service area is defined by the 45 dB cochannel and 0 dB adjacent channel D/U standards and whether determinations of interference must be made using the highly-conservative methodology set forth in Appendix D to the *MDS/ITFS Two-Way Order,* as amended. If an applicant must demonstrate that it can serve its booster service area without interference by using the Appendix D methodology, and must employ the 45 dB and 0 dB D/U benchmarks as the definition of interference, the applicant often will not be able to make the showing. The net result will be that boosters that actually could operate utilizing D/U benchmarks more appropriate for digital services and a methodology for calculating interference that avoids the worst-case assumptions of Appendix D will go unbuilt and members of the public unserved. That result would be passing strange. Since the adoption of the *MDS/ITFS Two-Way Order*, the MDS/ITFS rules largely have been predicated on the ability of a licensee to accept interference to its own facilities yet, Sections 21.913(b)(6) and 74.985(b)(3) prevent a booster applicant from accepting interference to its proposed facilities.

In short, while Sections 21.913(b)(6) and 74.985(b)(3) once played a useful role despite the burdens they impose on applicants, the Commission's 1999 clarification of the interference protection rules now renders those rules obsolete. Particularly given that these rules have the unintended effect of precluding new services to the public, the Commission should effectively extend the blanket waiver issued for the first filing window by eliminating the rules altogether.

9. Eliminate the "one-to-a-market" rule. Section 21.915 of the Rules provides that "[e]ach applicant may file only a single [MDS] application for the same channel or channel

group in each area." That rule was adopted in 1983,[26] and clarified in 1985, when the Commission started utilizing lotteries to select from among mutually-exclusive applicants in order to avoid "stuffing the ballot box" by lottery hopefuls.[27] Given that the Commission has recently gone to great lengths in the *MDS/ITFS Two-Way Order* to promote the cellularization of MDS usage in urban areas (which cellularization by its very nature requires multiple applications for the use of a given channel within the same area), and that the Commission long-ago ceased using lotteries to select from among mutually-exclusive applicants, this rule has outlived its usefulness and should be eliminated.

10. Eliminate the filing of interference agreements. In 1995, the Commission adopted Section 21.937(a)(3) of the Rules, which requires the filing of an interference consent agreement upon the earlier of the passage of thirty days from its ratification or the submission of an application dependent upon the agreement.[28] More recently, in the *MDS/ITFS Two-Way Order*, the Commission adopted a procedure under which applicants would be required to certify that they had obtained any necessary interference consents, but would not be required to submit those

---

[26] The "one-to-a-market" requirement in Section 21.915 was initially set forth in Section 21.901(d)(2). *See Amendment of the Commission's Rules with Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems*, 48 Fed. Reg. 33873, 33900 (July 26, 1983).

[27] *See Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, Second Report and Order, 50 Fed. Reg. 5983, 5987 (Feb. 13, 1985).

[28] *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589 (1995).

to the Commission.[29] In light of that recent development, Section 21.937(a)(3) should be eliminated.

11. Eliminate equipment ownership and control requirements (47 C.F.R. § 21.903(b)(1)-(2)). Section 21.903(b)(1) requires a common carrier MDS station operator to "control[] the operation of all receiving facilities," including any equipment necessary to convert an MDS signal to a standard television channel (excluding the television receiver). Section 21.903(b)(2) requires a common carrier MDS station operator to give a subscriber the option of owning his or her receiving equipment (except for the decoder) so long as (i) the subscriber provides the type of equipment as specified in the MDS operator's tariff; (ii) the equipment is in suitable condition for the rendition of satisfactory service; and (iii) such equipment is installed, maintained and operated pursuant to the MDS operator's instructions and control. These requirements (which are now over twenty-five years old) are not imposed on MDS stations that elect to operate in the non-common carrier mode, nor are they imposed on fixed wireless providers in higher frequency bands that provide identical services, common carrier or otherwise (*e.g.*, WCS, LMDS, 24 GHz and 38 GHz).[30] Moreover, for the reasons set forth below, these rules have become irrelevant in the wake of recent regulatory and marketplace developments, and thus should be eliminated entirely.

The Commission initially mandated operator control over MDS receiving equipment because, in the Commission's view at that time, MDS receiving equipment required "professional installation and maintenance in order to insure satisfactory quality of service and reasonable privacy of the transmission."[31] At the same time, the Commission wanted to preserve

---

[29] *MDS/ITFS Two-Way Order*, 13 FCC Rcd at 19146-50.

[30] *See* 47 C.F.R. §§ 27.2, 101.511, 101.1013.

[31] *Multichannel Distribution Service*, 45 FCC 2d 616, 625 (1974).

an MDS subscriber's right to own his or her receiving equipment, provided that it was compatible with the MDS operator's system and subject to the operator's control.[32] However, to the extent that MDS receive-only equipment is used to receive multichannel video programming service, these policies have been superseded by the Commission's rules for "navigation devices," which are defined to include any type of device used by consumers to access multichannel video programming and other services over multichannel video systems, including, *inter alia*, MDS antennas, downconverters and set-top boxes.[33] Those rules *require* that subscribers be permitted to own and attach MDS antennas, downconverters and set-top boxes, unless the attachment causes electronic or physical harm or would facilitate theft of service.[34] The Commission's rules for navigation devices thus reject Section 21.903(b)(1)'s "operator control" requirement for MDS receiving equipment, but preserve Section 21.903(b)(2)'s subscriber ownership requirement. As such, they render both rules superfluous where MDS receiving equipment is used to access multichannel video programming.

Furthermore, the rules are equally superfluous where MDS receiving equipment has a transmit function that enables a subscriber to transmit information "upstream" to an MDS operator's response hub. As a general matter, given that MDS providers are competing in a marketplace already dominated by incumbent cable operators and landline telephone companies, they already have more than enough incentive to exercise whatever control over their facilities is

---

[32] *Id.*

[33] 47 C.F.R. § 76.1200(c); *see also Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14784 (1998); *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596, 7618 (1999).

[34] 47 C.F.R. § 76.1201. Similarly, an MDS operator that provides multichannel video programming generally may not take any action that prevents a subscriber from acquiring a

necessary to ensure a high quality of service to the customer, without Commission regulation. Moreover, to the extent that concerns about professional installation were the primary rationale for Section 21.903(b)(1), those concerns were addressed thoroughly in the Commission's *MDS/ITFS Two-Way Order* and reconsideration thereof, in which the Commission determined that professional installation of MDS transceivers is necessary only in very limited situations.[35] The Commission also addressed the "operator control" issue by adopting various safeguards that are designed to ensure that MDS operators exercise sufficient control over their facilities when they provide two-way services.[36] Finally, in view of the Commission's desire to transform MDS into a "fully flexible service in which licensees can provide either one-way or two-way service *in response to the demands of the marketplace*,"[37] it simply makes no sense for the Commission to continue imposing an antiquated subscriber ownership requirement on MDS transceivers. As it has already done for fixed wireless providers in higher frequency bands, the Commission should instead give MDS operators the flexibility to customize their equipment ownership policies in a manner that is best suited to the marketplace and the technical and security needs of their networks.

---

navigation device from retailers, manufacturers or other unaffiliated sources, provided that the device does not perform conditional access or security functions. *Id.* § 76.1202.

[35] 47 C.F.R. § 21.909(n); *see also MDS/ITFS Two-Way Reconsideration Order*, 14 FCC Rcd at 12777-81.

[36] Specifically, the Commission's rules require that MDS transceivers (1) be operated only when engaged in communications with their associated booster, hub or primary stations, and (2) be activated only by a signal from a booster or primary station. 47 C.F.R. §§ 21.909(m), 74.939(o). Hub licensees also must have a means to remotely deactivate any subscriber's transceiver within their response service areas ("RSAs"). *Id.* As noted by the Commission, these provisions are designed to "give an added measure of control to system licensees useful for conducting interference tests and other system evaluations, and will result in a positive "interlock" feature that prevents inadvertent activation of a newly installed [transceiver] when the response antenna is not properly installed . . .." *MDS/ITFS Two-Way Reconsideration Order*, 14 FCC Rcd at 12779.

[37] *MDS/ITFS Two-Way Order*, 13 FCC Rcd at 19119 (emphasis added).

12. Conform Section 21.902(i) requirements for service of applications for new or modified MDS stations. In light of the *MDS/ITFS Two-Way Order*, the Commission should amend Section 21.902(i) of the Rules and eliminate the requirement that applicants for new or modified MDS stations serve copies of those applications by certified mail, return receipt requested, upon neighboring ITFS licensees and applicants and then submit "ITFS Service Notices" to the Commission documenting receipt. This requirement imposes unnecessary burdens on both MDS applicants and the Commission's staff, without any appreciable public interest justification. While WCA is not now objecting to the obligation that applications be served, it urges the Commission to allow service to be accomplished by regular mail and eliminate the Section 21.902 requirement that service be accomplished by certified mail, return receipt requested, and that filings be made with the Commission to document receipt.

Retention of this rule for new or modified main MDS stations is impossible to square with the Commission's regulatory scheme for MDS and ITFS. When an application for a new ITFS station is filed, the filer is under no obligation to serve any neighboring licensee or applicant whatsoever, much less by certified mail, return receipt requested. And, under the *MDS/ITFS Two-Way Order*, when an application for a new or modified MDS or ITFS response station hub, new or modified MDS or ITFS booster, or modified ITFS station is filed, the Commission requires service upon neighboring licensees and applicants, *but that service can be accomplished by regular mail.*[38] Moreover, the *MDS/ITFS Two-Way Order* imposes no requirement that an applicant document to the Commission the completion of service, other than to certify in its application that it accomplished service in accordance with the Commission's

[38] *See* "Mass Media Bureau Provides Further Information on Application Filing Procedures and Announces Availability of Electronic Filing for Two-Way Multipoint Distribution Service and Instructional Television Fixed Service," *Public Notice,* FCC DA 00-1481 (rel. June 30, 2000).

Rules. In light of this recent decision to rely on service by regular mail and applicant certification for most MDS and ITFS applications, the more burdensome requirements of Section 21.902(i) can and should be eliminated.

13. Eliminate the ban on cross-referencing of material. Section 21.13(a)(6) bars applications in the MDS from cross-referencing previously filed material. WCA appreciates that this rule has substantial merit in many instances and that applicants generally should be required to submit applications that are complete without reference to extraneous materials. However, the rule now imposes burdens on applicants who are attempting to utilize the new Broadband Licensing System ("BLS") for electronic filing. As set forth above, WCA urges the Commission to eliminate many of its requirements for the filing of large documents like contracts and articles of incorporation. If it does not, where such large documents are already on file with the Commission, it makes little sense to require them to be scanned into .PDF files in order to be resubmitted as part of an application that is being filed electronically. Therefore, WCA suggests that where the Commission requires a separate document to be filed with an application and that document is already on file, the Commission permit a cross-reference that includes specific identification of the date of filing and the file number where the material is located.

14. Eliminate provisions not applicable to MDS. For a wide variety of historical reasons, Part 21 has become one of the more complex parts in the Commission's Rules. Certainly, one of the causes of the complexity is that Part 21 has from time to time been used to regulate services other than MDS. However, since the Commission created Part 101 and transferred regulation over point-to-point services to that Part in 1996, Part 21 has been used to regulate MDS alone.[39] Unfortunately, there are still numerous provisions of Part 21 that by their

[39] *See Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Services, Amendment of Part 21 of the*

very terms are not applicable to MDS (*e.g.* Sections 21.15(a) and (b)). Because these provisions are obsolete, they should be eliminated from Part 21.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to issue a *Notice of Proposed Rulemaking* proposing the rule changes discussed above.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: _____
Paul J. Sinderbrand
Robert D. Primosch

WILKINSON BARKER KNAUER, LLP
2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037-1128
202.783.4141

Its Attorneys

October 10, 2000

Commission's Rules for the Domestic Public Fixed Radio Services, McCaw Cellular Communications, Inc. Petition for Rulemaking, 11 FCC Rcd 13449 (1996).

CERTIFICATE OF SERVICE

I, Stephanie Sieber, hereby certify that the foregoing Comments was served this 10th day of October, 2000, via hand delivery, addressed to the parties listed on the attached list:

Federal Communications Commission
Office of the Secretary
445 12th St. S.W.
Washington, D.C. 20554

Sheryl Todd
Federal Communications Commission
Accounting Policy Division,
Common Carrier Bureau
445 12th St. S.W.
Washington, D.C. 20554

S. Sieber

Stephanie Sieber